No. 598

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

J. F. HIGGINS, Master of the Respondent Steamer "Homer," Claimant, and J. S. GOLDSMITH and F. M. GRAHAM, Stipulators, *Appellants,*

vs.

CHARLES H. NEWMAN, *Appellee.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF WASHINGTON, NORTHERN DIVISION.

IN ADMIRALTY.

SUPPLEMENTAL BRIEF OF APPELLANTS

ON ADDITIONAL TESTIMONY TAKEN IN APPELLATE COURT

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STATEMENT.

The theory and contention of the appellee, upon the final hearing in the District Court, was, that the evidence produced in his behalf, as to the nature and extent of his injuries, established *permanent and total*

disability. This testimony was taken some six months prior to the final hearing in the District Court and was presented by the appellee to that court as the *then true state of facts in the case* as to his past and present physical condition resulting from the injuries complained of. The District Court, upon the case presented, *found permanent and total disability*, and the decree was rendered upon that theory and basis.

In the trial below, the medical and surgical testimony on behalf of libellant was taken in August, 1899, and as late as November of that year, when a trial was being pressed by libellant, the claimant applied to both the libellant and the court for permission to have a surgical (physical) examination made of libellant, and it was denied by both, and the case thus went to trial in February following without any further information or tests.

About ten days prior to the date at which the cause was assigned for final hearing on appeal at the May term of this court at San Francisco, the appellants discovered by mere accident that such a change in the physical condition of the libellant—not only then, but even at the time of the final hearing in the District Court—had occurred, over the condition contended by the appellee to be established by the testimony, as to make it manifest that a fraud had been practiced upon the District Court and the owners of the ship, and was being attempted to be perpetuated in this court. Upon a showing by affidavits to this effect, the cause was, upon the application of appellants, continued to the

September term of this court at Seattle, and referred in the meantime to the United States commissioner of the District Court, in which the cause was tried below, to take additional testimony, as to the fact, nature and extent of the appellee's injuries and as to the truth or falsity of appellants' charges of simulation and fraud. This additional testimony has been taken and is now before the court.

We contend that it is conclusively shown by this additional testimony: that, whatever may have been the true nature and extent of the appellee's injuries at the time the testimony was taken upon which the cause was tried below, the appellee had, at the time of the final hearing in the District Court, improved to such an extent that he then certainly knew that he was not permanently or totally disabled, and that he had then substantially recovered, if he was ever seriously injured.

This additional testimony thus raises entirely new and vital questions in the case, with which it is the sole purpose of this supplemental brief to deal.

The references are to the printed record of the additional testimony taken in this court.

POINTS.

I.

That it is established by the additional testimony taken on appeal that the appellee was *not permanently or totally disabled* and had, even at the time of the trial

in the District Court, fully recovered, if seriously injured at all—and has only been simulating.

II.

That a fraud was practiced by the appellee upon the District Court and the owners of the ship, in presenting to that court, as he did, the testimony theretofore taken in his behalf, showing, as he contended, permanent and total disability, as the *then true state of facts in the case;* when he had, in fact, so greatly improved, since the taking of the testimony, that he then, at least, well knew that he was not permanently or totally disabled and had substantially recovered; and in not only thus concealing and withholding that fact from the court and the claimant, but by his own deliberate and intentional acts deprived them of the means of discovering it.

III.

That the fraud practiced by the appellee upon the District Court and the claimant was intended and attempted to be perpetuated by him in this Honorable Court, by insisting upon the affirmation of the decree of the lower court, obtained as it was, and concealing and withholding from this court and the appellants his present as well as his past physical condition, and all opportunity for investigating the same.

IV.

That the refusal of the appellee to submit to a surgical (physical) examination on the part of the appellants, on reference of the case to take additional

testimony on appeal, and his failure to cause such an examination to be made, by reputable surgeons of his own selection, upon his own account, under the circumstances of this particular case, raises a conclusive presumption that he is guilty of fraud and simulation, as charged.

V.

That whatever merit the claims of the appellee may have had (and we deny they ever had any), the fraud practiced by him through deceit and fabrication of evidence, upon the District Court, as well as the owners of the ship, in the trial below, and his intention and attempt to perpetuate the same in this court, estops him from asserting such in this or any other court, and is fatal to his recovery.

ARGUMENT.

I.

FIRST POINT.

"That it is established by the additional testimony taken on appeal that the appellee was not permanently or totally disabled and had, even at the time of the trial in the District Court, fully recovered, if seriously injured at all,—and has only been simulating."

POPULAR FEELING FOR APPELLEE.

(1) The appellee resides at West Seattle, a small suburb of the City of Seattle, largely inhabited by

working men, and particularly those in maritime pursuits, as is the appellee. The appellee has thoroughly deceived his neighbors and the inhabitants of this little village into believing that he was made a hopeless and pitiable cripple for life by the injuries complained of, and has thus thoroughly aroused and enlisted their sympathies in his behalf, and there has been no disposition among them to disclose anything that would in any manner militate against his recovery against the representatives of the ship. This condition of affairs existed at the time of the trial in the District Court and rendered it impossible for the claimant below to obtain any information whatever as to the conditions and acts of the appellee. This same condition of affairs not only existed upon the taking of the additional testimony and had to be contended with, but, with it, a feeling of great bitterness towards the appellants and everyone who attempted to in any manner assist them. In many instances, information unguardedly disclosed was modified or positively denied when it was learned that it would be used as evidence against the appellee. (Additional testimony generally.)

POLICY AND TACTICS OF APPELLEE.

(2) The policy and tactics of the appellee have been to get upon the record a *premature and ex parte phase of his alleged injuries.* In this he exercised such undue haste that his own physicians testify that it was not then possible to determine what his injuries were or would develop into (our principal brief, pp. 38, 39, 40). Then to remain in seclusion or in disguise, except to

those upon whom he could implicitly depend, and to appear to them only to the extent that he could depend upon them; and to have this case thus heard and determined upon *only such facts as he chose to disclose and in such phase as he saw fit to present them.* He has never shown a disposition to be fair or honest towards the claimant, the appellants or the court, either in the trial below or on this appeal. He has purposely placed almost insurmountable obstacles in the way of a full and fair investigation into the facts of the case. He has purposely precluded the appellants from resorting to the primary, surest and best, if not the only true, test—a surgical (physical) examination—of the fact or character and extent of his alleged injuries, and has failed to voluntarily submit himself to such a test, except immediately after his alleged injuries and long prior to the trial of this case below. Had not dire need, staring him in the face, driven him from his lair—even then in disguise, and the merest accident discovered his maneuvers and identity, appellants would have been compelled to submit this appeal, as they were the case in the District Court, upon mere negative testimony, cross-examination of appellee's witnesses, and presumption arising from suspicious circumstances and acts. (Testimony generally.)

TANGIBLE EVIDENCE.

(3) Although appellants have been thus prevented by the direct and deliberate act of the appellee from presenting to the court primary the best and most satisfactory evidence upon the important issues raised

in this case, as to the fact, nature and extent of his injuries, yet they are now, for the first time, able to submit to the court, in the additional testimony, tangible facts and incidents so inconsistent with the claim and contention of appellee, that he was permanently and totally disabled and ever will be such and unable to perform any manual labor whatever, that the charge of simulation and fraud is established and a conclusive presumption raised that the appellee, if injured at all, has long since fully recovered. (Additional testimony generally.)

CLIMBING THE HILL—SAMUEL F. COOMBS.

(4) Judge Samuel F. Coombs, Justice of the Peace of West Seattle precinct, the home of appellee, testified that, as early as November of last year and at divers times since, he saw the appellee make repeated trips, without assistance and sometimes without crutch or cane, up and down the steep incline from the beach at West Seattle to the top of the high bluff where he resides, and gave little or no indication of disability. (21–26, 32, 33, 36–38, 40.)

(5) This testimony is met by the appellee by admitting that he did go up and down the hill, and simply denies he performed the feat at as early a date or with the ease described by Judge Coombs, and supplements this with a venomous attack upon the reputation of Judge Coombs for truth and veracity, which he places himself in the position of admitting to be false by not following it up with impeaching testimony other than the malicious attacks of himself and his wife. The

testimony of appellee's non-expert witnesses, to the effect that, in their opinion, he was unable to perform this feat, is too worthless to be considered. It is simply a question of veracity between Judge Coombs and the appellee, and this we are willing to submit upon the testimony.

CROSSING ON THE FERRY—CAPTAIN WM. J. WAITE.

(6) Captain William Waite, master of the West Seattle Ferry, testified that, at or about the time of the final hearing in the District Court and at divers times since, he saw the appellee cross the bay on his ferry-boat from his home at West Seattle to the City of Seattle proper, where his litigation was being carried on; that in these trips he was unaccompanied by anyone, and in some of them he used a cane, and in others was without crutch or cane, and gave little or no indication of disability. (53–56.)

(7) This testimony is also met by the appellee with the admission that he crossed on the ferry-boat frequently, but denies that it was at as early a date or that he got along with the ease described by Capt. Waite. The testimony of Capt. Waite is too disinterested, direct and positive to be overcome by merely the denials of the appellee and his flimsy evasions. We call the attention of the court to the unfairness and disposition of the appellee to evade and smother the damaging charges contained in Capt. Waite's testimony. (411-414). According to Capt. Waite's testimony, which stands uncontradicted save in the particular above men-

tioned, the appellee is no cripple and was not at the time of the trial in the district court.

PAINTING THE BOAT—MICHAEL KELLY.

(8) Mr. Michael Kelly, who was sent to West Seattle on April 23rd to ascertain what he could about the appellee, testified that he found the appellee at his shop and boat-house down on the beach at West Seattle, engaged in painting a boat; that from his actions, maneuvers and appearance, described by him, appellee showed no indication of being a cripple; and that the shop had every appearance of being a working shop. (5, 7, 8, 9, 10, 14, 15).

(9) The testimony of Mr. Kelley is met by appellee's admissions that he was at the boat-house as stated by Mr. Kelley (371, 372) but he positively denied that he was doing any painting whatever. The testimony of appellee's brother-in-law, Creamer, and the fisherman, John Masculin, who claim to have painted the whole of the boats and that appellee did no painting on them, is conflicting in itself. Creamer knows but little, and the testimony of the fisherman is too reckless, rambling and unreasonable to be worthy of any consideration whatever. Besides, the admission of the appellee, that he was at the boat-house *alone*, when Kelley saw him and charges him with painting the boat, completely circumvenes the testimony of Creamer and the fisherman and establishes that appellee could have then been painting the boat, as Kelley charges him, without either Creamer or the fisherman knowing anything about it. (371, 372). It is simply a question of veracity between

Kelley, a reputable, disinterested and unimpeached witness, and the appellee, deeply and keenly interested and resting under the charge of fraud and simulation. Kelley is corroberated in parts of his testimony by both the appellee and his wife and by appellee's witness, A. L. Weaver. Appellee admits that he was at his boat-house, alone, when a man like Kelley came there and asked him about Billy Gray and about his injuries on the "Blakeley." (7, 8, 371, 372). His wife testifies that Kelley called at her house and inquired for her husband, and that she told him he was down on the wharf, and that Kelley asked her if her husband had not been hurt and how he walked, whether with a cane and straight up, or slowly, and told her that he was looking for Billy Gray. (5, 6, 398, 399). A. L. Weaver testifies that Kelley inquired of him for Newman, and that he called to Newman, in the direction of his shop, and received an answer. (7, 240, 241). Mr. Harben, witness for appellants, also testified that he was at the boat-house the day after Kelley, and got fresh paint on his clothes from the boat (41, 42); neither Creamer nor the fisherman have shown they did any painting on the boat about that time. All this strongly tends to corroborate the whole of what Kelley says.

(10) Mr. Kelley also testifies that he saw the appellee subsequently and that he showed no indication of being a cripple. (10).

M. B. HARBEN.

(11) Mr. M. B. Harben, who was also sent to West Seattle to ascertain what he could about the appellee,

testified that he saw him and talked with him at his home on April 25th; and on or about May 14th met him on the beach at West Seattle a considerable distance from his home; and was with Deputy Marshal Ide when he served a subpœna on appellee June 11th; that he saw appellee walk and stand erect without support for at least fifteen minutes, and describes his acts and appearance at all these times; and that he showed little or no indication of disability. Appellee admits seeing Mr. Harben at his house, but denies meeting him on the beach. (41, 44, 164).

SERVICE OF SUBPŒNA—G. L. IDE.

(12) Mr. G. L. Ide, Deputy U. S. Marshal, served a subpœna on the appellee June 11th, 1900, to appear as a witness on behalf of the appellants, in the taking of the additional testimony before Commissioner Bowman, and testified that when he called at the residence of the appellee, he came to the door, and, on seeing him, slammed the door in his face, but upon being advised by witness that he was an officer, appellee again opened the door and received the subpœna. Witness saw appellee walk and stand for a considerable time, described his appearance, movements and conduct, and says he saw no indication of disability. (88-92, 464).

WORK ON GRADE—NEAL MURPHY.

(13) Mr. Neal Murphy, a contractor on grading work at West Seattle, testified that the libellant worked for him as an able-bodied laborer, grubbing, shoveling and running a wheelbarrow, six days in March last, under the name of "H. Newman," and eight days in

April last, under the name of "J. Newman;" that the appellee worked along with the other men, made a good hand and was not discharged, but quit of his own accord. This was just following the decree in this case in the District Court. (93, 94, 96, 97, 110, 111, 114, 115, 125-7, 131-3).

TIME CHECKS.

(14) Mr. Murphy, who had personal charge of the hiring and discharging of his men and close personal supervision over them and their work, testified directly and positively to these facts and also produced in evidence the time checks (465-8) issued by him to the appellee for this work and delivered to him, and all of which were signed by appellee in his presence and afterwards cashed by appellee. (101, 116–118, 122–129, 134, 150–154.)

APPELLANTS' EXPERTS ON SIGNATURES TO TIME CHECKS.

(15) Mr. Jacob Furth, President of the Puget Sound National Bank of Seattle, the largest and strongest banking house in the Northwest, who has had seventeen years continuous, active service in the banking business; Mr. R. V. Ankeny, cashier of the same bank of which Mr. Furth is president, with eighteen years continuous, active experience in the banking business; Mr. A. M. Brooks, ex-postmaster of San Francisco and Seattle and now cashier of the Boston National Bank of Seattle, with fifteen years' experience as postmaster and eight years' continuous and active service as banker, and Mr. Frederick K. Struve, paying teller of the First

National Bank of Seattle, with ten years' continuous, active service in the banking business, were produced by appellants as experts upon handwriting. The signatures of appellee, made in the presence of Mr. Murphy, to these time checks and the admitted and sworn signatures of the appellee, some eight in number, in the original record in this cause, were placed before these thoroughly competent and practical experts in signatures and handwriting, and they all directly, positively and unhesitatingly testified that, in their opinion, all of the signatures, "H. Newman" and "John Newman," to the time checks in question, were in the same handwriting and written by the same person as the admitted and sworn signatures of the appellee in the record. (Ankeny, 138–147; Brooks, 169–180; Struve, 182–196; Furth, 196–206.)

APPELLEE ACTS UNDER ASSUMED NAME.

(15½) Mr. Murphy says he took down appellee's name as he gave it to him, "H. Newman" in March (94) and "J. Newman" in April. He also testified that he only takes one initial to save space on his book, and that whether right or wrong he always requires a man to sign as his name appears on the book (135). This together with the fact that appellee says he sometimes goes by the name of "Harry Newman" for short (373) may relieve him from the suspicion necessarily involved in leaving off his first name in March. This however does not apply to the April transaction. There he not only has an entirely different initial, but goes still further in signing his name "John Newman," when it

is "J. Newman" on the book (110) and time check (467–8), and thereby negatives any requirement of him on the part of the contractor as to signing his name.

DENIALS OF APPELLEE AND HIS HOUSEHOLD.

(16) As might be expected, the appellee and his entire household, consisting of his wife and brother-in-law (213), Creamer, controvert the testimony of Mr. Murphy, but we submit it makes little difference what their testimony may be; they are too highly interested; the appellee stands charged with too grave a fraud and his household too much in the position of accomplices for their testimony to be worthy of any consideration, in refutation of the disinterested, direct and positive testimony of Mr. Murphy, especially supported and corroborated as he is. The appellee and his immediate household should be treated as one and the same in this particular, for it is selfevident, under the peculiar circumstances of this case, that, if the appellee is guilty of the fraud with which he is charged, his immediate household is equally guilty with him, for it would have been impossible for the appellee to have carried on such a scheme to the extent to which he has gone without the knowledge and consent, or connivance, at least, of his immediate household.

APPELLEE HAS TESTIFIED FALSELY.

(17) We submit that it is established by the additional testimony that appellee has testified falsely in more than one particular, and consequently no part of his testimony worthy of belief. His testimony and that of Judge Samuel Coombs in several particulars is

directly contradictory upon material points where neither could possibly have been mistaken, and either one or the other, knowingly, testified falsely. The appellee testifies that Coombs saw him twice in April last and talked with him at length each time about the settlement of his case, (359-361, 392-394); and the testimony of Judge Coombs is that he had not seen the appellee for three or four months prior to that time. (28, 32, 33, 37). This relates to too recent a transaction for either party to be mistaken. The testimony of one is true and of the other is false, and which is it? Again, Michael Kelley testifies that on April 23rd last, he found the appellee at his shop at West Seattle, painting a boat. (7, 8). Appellee says that he was at the shop at the time referred to and saw Kelley, but was not painting a boat and never painted a hand-stroke upon it. (358-9). Neither can be mistaken in this matter, and the testimony of one is true and of the other is false. The testimony of Capt. Waite (53-56) and that of the appellee, as to the times appellee crossed on the West Seattle ferry and his movements and appearances at such times, is directly contradictory and the occurrences too recent to admit the possibility of mistake in either, and the testimony of one must be true and of the other false. The testimony of Mr. Murphy and the appellee, as to appellee's working on his grading work, is directly contradictory, wherein neither could possibly be mistaken, and the testimony of one must be true and of the other must be false. We submit that it would be a remarkable fact if this testimony of Judge Coombs, Mr. Kelley, Capt. Waite and Mr. Murphy,

reputable and wholly disinterested witnesses against whom no attempt was made at impeachment, should be utterly false, and this contradictory testimony of the appellee, who is interested not only to the extent of twelve thousand dollars in the result, but is more deeply interested in refuting the charges of fraud, simulation and perjury made against him. We submit that it is impossible for all these disinterested witnesses to be wrong in every instance, and perjure themselves without cause or excuse and the appellee right in every instance mentioned. If the appellee is wrong and has testified falsely in these particulars, or any of them, as we charge he has in all, and is shown by the additional evidence to have done, then, we submit, no part of his testimony is worthy of belief, and no part of his case or claims that he makes are free from suspicion, and the whole should be rejected.

VILLIFICATION OF APPELLANTS AND THEIR WITNESSES.

(18) We beg to call the particular attention of the court to the methods and tactics resorted to by the appellee in the conduct of his case, particularly upon the taking of the additional testimony. It seems to have been his idea that his case was strengthened and the damaging testimony against him refuted by villifying the other side and casting all manner of insinuations, innuendoes and charges of buying evidence, perjury, subornation of perjury and conspiracy to defraud. (Kelly, 11–19, 90; Coombs, 25, 31–36, 40; Harben, 48–52, 160, 161, 165, 207; Waite, 59; Gardner, 62–68, 78–79; Ide, 91, 92; Murphy, 94, 97, 106, 107,

109, 118, 119; Wells, 223–4; Cox, 256–7; Stevenson, 299; Newman, 359–366.) Nor did they stop here. Open threats were made against witnesses, before testifying, while testifying and after testifying, as well as everyone connected with the appellants' case. (Harben, 155, 156, 158, 159; Murphy, 122.) These attacks were refuted in every instance by the witnesses and persons against whom they were made, and in many instances by the appellee's own witnesses. (Cox, 256–7; Coombs, 38; Wells, 223–4.) The fact that no attempt whatever was made by the appellee to substantiate a solitary one of these charges or impeach a single witness produced by the appellants raises a conclusive presumption of the bad faith of the attacks. Naturally, Mr. Gardner, Mr. Harben and Mr. Kelley, as detectives, would be assailed. We regret the necessity of calling in detectives, but were driven to it by the acts of the appellee in blocking the usual and ordinary methods of investigation and resorting to the tactics he has. These detectives were employed and used as a necessary and legitimate agency for the discovery of the truth, and the appellee has not shown, and we defy him to show—for it is not true—that in one solitary instance has this agency of uncovering truth concealed by the appellee, been turned to any bad purpose. We beg to call the attention of the court particularly to the free and frank statement of Mr. Gardner, where he might have declined to answer if he had desired (59-66). We submit this statement of Mr. Gardner stands admitted as true by the appellee, as it is true, in every detail. Appellee brought out the statement and did not even

attempt to controvert any part of it. We submit the high character and standing of Mr. Gardner in the community fully cognizant of these facts and in which he has resided for the past twenty years (60, 61) stands, also admitted by the appellee, by his failure, after making so unnecessary an attack, to even attempt to impeach it, which he could easily have done, *were it vulnerable to such an attack.*

APPELLEE'S PRETENDED INABILITY TO ATTEND BEFORE THE COMMISSIONER.

(19) We respectfully call the attention of the court to the fact that appellee failed to obey the subpœna served upon him by appellants, to appear as a witness in their behalf before the commissioner (88, 120) and that no showing whatever was made for this failure, except the statement of his counsel that he was unable, by reason of his crippled condition, to attend. The testimony of the United States marshal, who served the subpœna, contradicts this idea. (88-93). It is admitted that he made frequent visits to Seattle before. Then, when Mr. Murphy called at appellee's house the second time, by appointment, he was found bolstered up with pillows, head bandaged, etc. (163). No one had before seen him in any such predicament. Then he had his testimony in his own behalf taken at his home in West Seattle, over objections of appellants. (353). There is absolutely no showing of his inability to attend at the commissioner's office, other than the statements of his counsel. These plays on the part of the appellee have

something of a theatrical appearance, but he has been too inconsistent or indiscreet to make a good actor.

APPELLEE'S TESTIMONY DISCREDITED.

(20) This conduct on the part of the appellee is not consistent with honesty and fair dealing, and discredits his whole testimony, and creates a suspicion which per meates his whole case.

TESTIMONY OF APPELLEE'S WIFE DISCREDITED.

(21) Mrs. Newman stands flatly contradicted by both Michael Kelly and Judge Samuel F. Coombs, in material particulars in which neither she nor they can possibly be mistaken, and she or they have deliberately testified to what is false. Kelly and Coombs have no interest in the matter, and she is even more keenly interested than her husband. We submit that upon the whole her testimony is discredited.

BROTHER-IN-LAW CREAMER.

(22) Creamer is but a boy, and his testimony is not positive and is in many particulars very indefinite and uncertain; he has no particular remembrance of what he testifies to and takes much for granted. (213-221). This and the fact of his keen interest in the matter renders his testimony of little value.

APPELLEE'S NON-EXPERT OPINION TESTIMONY.

(23) This testimony is also attempted to be met and overcome by the testimony of numerous non-expert witnesses, to the effect that, in their opinion, formed from mere observation of the acts and appearances of

the appellee, his injuries and disability therefrom, were such that he was unable to do and that it was impossible for him to do the work that he was charged with doing. It is a remarkable fact that appellee should resort to and rely upon such evidence to the extent he has, after objecting to the same kind of evidence as incompetent and inadmissible, when offered by appellants, as the best evidence within their reach. (8, 9, 68, 69, 90). Certainly appellee's nerve has not been injured—he promptly objected to non-expert witnesses expressing their opinion as to the physical condition of appellee, from his acts and appearance upon the ground that such testimony was incompetent and inadmissible, because the witnesses were not physicians or surgeons; then refused to permit physicians or surgeons to examine him, that they might testify as experts as to his physical condition; and at last rested his case, as to his physical condition, solely upon testimony identical in character to that he objected to the appellants offering.

(24) While such testimony may be technically competent and admissible, yet it is, under the peculiar conditions of the case, as far as the appellee is concerned, secondary in character, for the reason primary, better and more satisfactory evidence was easily within his reach, and, if competent and admissible, is entitled to little weight, and the resort to it ground for grave suspicion. The best and primary evidence of the fact of the injury or disability and the nature and extent of it, and the ability of the appellee to labor under such conditions, particularly when fraud and simulation are

charged, admitted and established to the extent they have been in this case, is the testimony of skilled surgeons after making an examination of the body of the appellee. His resort to and reliance upon such evidence, under such conditions, raises a conclusive presumption that the primary and better evidence easily within his reach, would, if produced, be unfavorable to him.

NEIGHBORS DID NOT SEE APPELLEE WORKING.

(25) Appellee also puts a number of his neighbors and friends on the stand, who testify that he did not work on Murphy's grade, because he could not have gone to and from the work without their seeing him, which they say they did not. This is always the weakest and flimsiest character of evidence. It is at best poor proof that an act was not done that someone did not see it done. It throws wide open the door to fraud and mistake. It gives an unscrupulous or over-zealous witness a powerful weapon for the destruction of the truth. If it were possible, under the circumstances and conditions, for the act in question to have been done, notwithstanding such testimony against it, then, of course, the testimony is absolutely worthless.

(26 All of appellee's witnesses on this point, excepting Mrs. Jenkins and Mrs. Thomas, admitted, on cross-examination, or it clearly appears from their testimony, that, while it may have been inconvenient, yet it was possible for the appellee to have evaded their observation in going to and from the place at which he is charged with doing the work, and might have done the

work without their knowing it, and this disposes of their testimony on this point finally. (Cooper, 265; Thomas, 292; Stevenson, 297-8; Kile, 309, 310; Goldberg, 319.)

(27) While Mrs. Jenkins and Mrs. Thomas were very positive (and this woman can be, upon evidence very unsatisfactory, measured from a legal standard, when her mind is bent that way—as these two women evidently are) that appellee could not have performed the work as charged and eluded their notice, yet they both admitted, on cross-examination, that they did not specially recollect having seen the appellee on any of the days on which he was charged with doing the work, and that they could recall no fact or circumstance which specially impressed it upon their memory that they saw the appellee on any of those days, and that they did see him upon any one of those days they admitted they depended solely upon their supposed habit and custom of calling at his house (Jenkins, 334-5; Thomas, 339). Had this testimony been given at an earlier stage of the appellee's alleged affliction, while the witness at least believed that he was in a pitiable and critical condition, it would be worthy of more consideration, but referring to a time, as it does, nearly a year after he was hurt and after he had been for a long time able to be up and around and out of doors and even make trips, unaccompanied, over to Seattle, we submit that it requires not a little credulity to believe that these two women were at that time as vigilent and faithful in their calls upon and attention to the appellee as they seem to

think they were. Their testimony shows this to be a fact. They both said they knew nothing about the appellee going up and down the steep hill from his home to the beach, or making trips to Seattle, and did not believe he did or was able to do either (344-6, 340-1), yet it is conclusively shown that he did both. Appellee admits it, so they could not have been as watchful of the movements of appellee during the months of March and April last as they seem to think they were. Their minds evidently run upon what they did during the earlier stages of the appellee's supposed affliction, when they were impressed with the supposed gravity of the situation, and confound that with the latter stage. The appellee could have easily kept out of their sight for a week at a time during March and April and they never have noticed it. There are numerous reasons disclosed by their testimony and the testimony generally why this could have been the case. They are simply mistaken, which they could easily be, and that is all there is of it.

DELIVERY OF LETTER—MRS. PETERSON.

(28) Great stress was laid by appellee, upon the taking of additional testimony, to the testimony of Mrs. Peterson as conclusively establishing that on April 7th, at least, the appellee was not working on Murphy's grade. Mrs. Peterson attempts to locate the appellee at his home on April 7th, during working hours, from the fact that she delivered a letter at his house that day and knows that it was April 7th because a certain calf was born on that day (326), both the delivery of the

letter and the birth of the calf, however, having remained a matter of memory only for more than three months (327). Mrs. Peterson admitted, on cross-examination, that she delivered other letters at appellee's house about that time and was also about that time pretty extensively engaged in the letter delivery business about the neighborhood (327-9). The occurrences, upon which she depends to refresh her memory, might easily have been connected with the delivery of other letters at the appellee's house, or the delivery of other letters in the neighborhood, and been mistaken by her as connected with this particular case. It is a little remarkable that she can identify this particular letter, and the time of its delivery, with such accuracy, and be wholly unable, as she was, to describe any other of the numerous letters, or the dates of their delivery at the house of the appellee or in the neighborhood (328-9). She also admits, on cross-examination, to having exchanged notes with the appellee upon this matter, just prior to testifying (329, 330).

J. A. COX.

(29) The testimony for appellee of J. A. Cox, who, for a brief period of five days, from March 15th to March 20th (249), filled the position of foreman for Mr. Murphy upon his grading contract at West Seattle, to the effect that appellee did not work on Murphy's grade while he was there, is entitled to no weight whatever. He was not filling that position on the grade until March 15th, when appellee had been employed and had been working two days. He admits, on cross-examina-

tion, that he had nothing to do with the employment, discharge or payment of the appellee, or any of the other men, and kept the time only one day—the first day he was there; that he simply superintended the actual grading work; that Mr. Murphy, during the time he was on the grade, had personal supervision over the men and the work as well, and hired and discharged the men, kept their time and paid them off; that ten or twelve men were working on the grade during the time he was there, and were changing all the time—new men coming on and old ones going off; that he could not name or describe any of the men who were then working on the grade; that he did not become acquainted with the appellee until April, and is now only slightly acquainted with him, and that he paid but little attention to the personnel of the men at work. (249-252). It would seem, from his own testimony, that he paid very little attention to anything, for, after a brief authority of five days, he was himself discharged. (256).

THE BOARDING HOUSE—LEN WELLS.

(30) Mr. Wells, the boarding-house and saloon keeper, testified that, *to the best of his knowledge*, appellee never boarded at his house. (222). He admits, on cross-examination, that he had very little personal supervision over his business; that he took little notice of his boarders if, according to his books, he was getting his pay, which, he says, was the principal item; (225, 226, 228, 233); that he did not deal personally with the man, "H. Newman," carried on his books, and could not recall him. (233). He insists that only four or five

of Murphy's men boarded with him during the time in question, and could only name two, and refused to produce his books to disclose the number or names of his boarders during that time, evidently to prevent the contradiction of his statement as to the number and rendering the possibility of appellee escaping his notice less probable. (228–233). His testimony, upon the whole, discloses an evident desire to assist the appellee and prevent any disclosures which would militate against his success. Taking this into consideration, in connection with his admissions, that he paid so little attention to matters, we submit his "to the best of my knowledge" stands for very little indeed.

APPELLEE'S EXPERTS ON SIGNATURES TO TIME CHECKS.

(31) The appellee denies that the signatures "H. Newman" and "John Newman" to the time checks in question are his, and attempts to disprove the same and overcome the expert testimony on behalf of the appellants by the testimony of persons produced by him as experts upon handwriting.

(32) Messrs. Best and McPhee, produced as experts by appellee, admitted, on cross-examination, their experience and skill as experts in handwriting was derived from their positions as accountant and paymaster respectively of a railroad contractor (410, 419, 420, 424, 482), having, in the course of their business, only to pass roughly (447) upon the genuineness of signatures of workingmen (446), involving very small sums (447), and where very little dependence is naturally placed upon the question of signatures, identity other-

wise being easily had and certainly resorted to, where there is any question at all (420, 447). They both admit they see similar features and characteristics in the two writings (421-2, 448-450).

(33) Mr. De Long, another of appellee's experts, admitted, on cross-examination, that he was a theoretical expert only (431, 444)—a writing teacher (431); that he had been employed during the past three and one-half years as deputy county clerk (443); that the duties of his position in no manner required the practice or exercise of the particular skill he claimed to possess (443-4); that he paid out no money of his own or anyone else, upon his skill and ability to determine the genuiness of signatures (444); that, after years of study and posing as a writing teacher and as an expert, he had so completely failed to impress anyone with faith and confidence in his skill and ability in these lines that he has been compelled, for the past three and one-half years, after ten years' residence in this community, (431) to earn his livelihood in a mere subordinate clerical position, the duties of which neither require nor permit of the exercise of the skill and ability he claims to possess. We submit the witness has not sufficiently qualified as an expert to give any weight to his opinion. That he has testified as an expert in other cases adds nothing to his qualification; there is no evidence as to the nature or importance of the cases in which he has testified or his *success as an expert witness.* We doubt not that Professor De Long can determine and describe with mathematical accuracy the deviations of any given

writing from strict Spencerian principals, but we seriously doubt and question his ability, from an entire lack of practical experience, to take signatures, devoid of every correct principal of penmanship, as those in question, and determine their genuineness, from comparison.

(34) Mr. Andrews, another of appellee's experts, is not positive (410, 415), and said he saw many similar features and characteristics in the two writings (411-413), and then repudiated his own testimony, whatever it may have been to either party, by admitting that he had little faith, anyhow, in expert testimony upon hand-writing (415). If he has no faith upon his own opinion and testimony, certainly others should not put more reliance upon it.

(35) That leaves Mr. Kelley, alone, of the experts produced by appellee, as possessing any of the qualifications of an expert to be compared with the experts produced by the appellants, and he admitted, on cross-examination, that his opinion was arrived at by consulting with Mr. Andrews, the president of the bank of which he himself is cashier (430), and also admitted that the two writings possessed similar features and characteristics (428).

(36) These witnesses, while their testimony may be admissible (as very little skill is required to qualify one as an expert witness in hand-writing), yet we submit their testimony is entirely insufficient to in any manner overcome or shaken the direct and positive testimony of the experts of such high character and recognized

practical experience as the witnesses produced by the appellants. Every one of the witnesses produced by the appellants as experts upon hand-writing are experts from a long, practical experience in business that requires the daily exercise of their skill and ability in that line in grave and important matters, and who are recognized as such by men of wide experience and affairs and entrusted by them, daily, to determine grave questions of business, and to pay out large sums of money, daily, upon the strength of their ability and skill as experts in hand-writing, and who have for many years stood the test. That there should be some difference of opinion on this point, even among experts, is not surprising and is only what invariably occurs.

(37) We submit the testimony establishes the identity of the signatures in question and corroborates Mr. Murphy to such an extent that nothing short of a full, fair and open surgical (physical) examination of the appellee, positively and conclusively establishing total disability during that time, and the production of the real Mr. "H. Newman" and "John Newman," if he be not the appellee, can overcome or in any manner shaken his testimony, and neither of which has the appellee done or shown any willingness to attempt.

CHARACTER AND STRENGTH OF MURPHY'S TESTIMONY.

(38) Mr. Murphy's testimony is too direct and positive and too thoroughly corroborated by the time-checks and supported by specific facts and incidents to be overcome or shaken by appellee's denials and the indirect and secondary evidence produced by him. Mr. Murphy

gave circumstances and incidents showing why these matters were specially impressed upon his memory, and that he could not be mistaken. He described the appellee perfectly to Mr. Harben as the man who worked for him, before he had seen appellee after discharging him (49); during the work in March, when he directed appellee and others to carry some lumber, he said the man Newman asked him to be relieved from that task, because he said he had a weak back (95, 107); that, when appellee quit work in March, he gave it as an excuse for leaving that he had a fifteen thousand dollar lawsuit on hand and had to go over to Seattle in connection with that matter. (96). Murphy, at that time, knew nothing about the facts in this case.

IDENTIFICATION OF APPELLEE.

(39) That there might be no question about the identity of the man Newman, who worked for Murphy, and the appellee, Mr. Murphy twice called upon appellee at his home, at the instance of Proctors for the appellants, the last time in company with Proctor for appellants and Proctor for the appellee, to see if it were possible for him to be mistaken, and both times positively identified appellee as the man who worked for him as "H. Newman" in March, and as "J." or "John Newman" in April. (97–99, 108–112, 116, 118–121, 125–6, 136). The first time he called at appellee's house, he found him in the back yard, splitting wood. (98).

AMOUNT OF WAGES OF NO SIGNIFICANCE.

(40) The claim of some of appellent's witnesses,

that the fact that he could earn four or five dollars a day as a ship carpenter, if able to work, should be conclusive that he did not work for Murphy at two dollars per day. There is nothing in such a supposition. He did the perfectly natural thing, in pursuance of his scheme. The fact is, the case lasted too long for appellee to hold out. Dire need compelled him to earn something (380), and had he worked at his particular trade—a ship carpenter, it would have been in circles where he was well known and the probability of its discovery by the appellants would have been infinitely greater than in his working for a stranger, on Murphy's grade around in the woods, where he could work under an assumed or modified name, as he did, and where appellants or anyone else would be least apt to expect it. The difference in protection, we submit, more than offsets the difference in wages.

ADMISSIONS OF APPELLEE AND HIS WITNESSES.

(41) It could not be expected that appellee or his immediate household would admit the charges of simulation and fraud made against him, or the facts and incidents shown by the appellants to establish them. However, they and a number of his witnesses have made admissions in this particular to an astonishing extent and sufficient in themselves to establish the charges of simulation and fraud and that the disabilities, if any, of appellee are neither permanent nor total. The appellee and his wife and his brother-in-law, Creamer,—his immediate household—admit that the appellee was able to get out of bed and move around in

the house about the latter part of last year or the first of the present and was soon thereafter able to go out of doors and make frequent trips from his home down to the beach and his boathouse and over to Seattle, largely without any assistance whatever. They all admit, and so do a number of his witnesses, that the appellee had greatly improved between the taking of the testimony in his behalf and the final hearing in the District Court, and has continued to improve ever since, and is now improving. (Appellee, 376-382, 392; Creamer, 219-221; Weaver, 239-241; Cooper, 262-3; Jenkins, 272-3; Thomas, 289-290; Mrs. Thomas, 341; Mrs. Newman, 397, 400-407.)

FRAUD AND SIMULATION ESTABLISHED.

(42) We submit that the admissions, appearances, perambulations and feats of the appellee, shown by the additional testimony, establish the charge made by the appellants that the appellee has been, from the beginning, simulating, and is now and was, substantially, at the time of the final hearing in the District Court, if he was ever seriously injured, a sound man *physically*.

II.

SECOND POINT.

"That a fraud was practiced by the appellee upon the District Court and the owners of the ship, in presenting to that court, as he did, the testimony theretofore taken in his behalf, showing, as he contended, permanent and total disability as the then true state of facts in the case; when he had, in fact, so greatly improved since

the taking of the testimony, that he then, at least, well knew that he was not permanently or totally disabled and had substantially recovered, and in not only thus concealing and withholding that fact from the court and the claimant, but by his own deliberate and intentional acts deprived them of the means of discovering it."

PERMANENT AND TOTAL DISABILITY CLAIMED.

(1) It has been the theory and contention of the appellee throughout the case that he was and is permanently and totally disabled—a miserable cripple for life. The testimony taken in his behalf, and which he contends establishes this condition of affairs, was taken some six months prior to the final hearing in the District Court. This testimony was presented to the court by the appellee, upon the final hearing in the District Court, as the then true state of facts in the case, without any suggestion or intimation of change or improvement in his condition since the taking of the testimony.

(2) The undue haste with which appellee pressed the trial in the District Court is pointed out in our principal brief at pp. 43, 44.

IMPROVEMENT ADMITTED.

(3) The appellee and his immediate household and a number of his witnesses admit, and it is clearly established by the additional testimony, that, at the time of the final hearing in the District Court, the appellee had at least so greatly improved and recovered that it was then certain that he was not permanently or totally disabled. (Admissions ante). This, alone, constituted

a fraud on the part of the appellee upon the District Court and the claimant.

CONCEALMENT.

(4) But it further appears from the original and additional testimony that the appellee not only failed to disclose, upon the trial in the district court, this change and improvement in his condition, since the taking of the testimony in his behalf, but by his own deliberate and willful acts, in remaining silent and in seclusion and refusing to submit himself to a surgical (physical) examination on behalf of the claimant and his failure to do so upon his own account, purposely kept both the court and the claimant, not only in utter ignorance of the false situation he was presenting to the court, but precluded them from the possibility of discovering it. (Our principal brief, pp. 41-44.)

(5) A more palpable, willful and deliberate fraud could not have been practiced than was thus planned and consumated by the appellee.

III.

THIRD POINT.

"That the fraud practiced by the appellee upon the district court and the claimant is intended and attempted to be perpetuated by him in this honorable court, by insisting upon the affirmation of the decree of the lower court, obtained as it was, and concealing and withholding from this court and appellants his present, as well as his past, physical condition, and all opportunity for investigating the same."

(1) Notwithstanding the disclosures, the appellee still adheres to his original theory and contention that he is permanently and totally disabled. He still remains in seclusion, and, upon the taking of the additional testimony, at the outset objected to the taking of any additional testimony although the court had opened the case for that purpose (3), and again refused to submit to an examination by surgeons on behalf of appellants (see argument on point IV, post), and failed to put in evidence any such examination, made even *ex parte*, by surgeons of his own selection, and thereby voluntarily and deliberately withholds the primary and only true test of his alleged disabilities and conduct both from this court and appellants. He thus commits himself to the intention and purpose of perpetuating in this court the fraud practiced by him upon the district court and the claimant.

IV.

FOURTH POINT.

"That the refusal of the appellee to submit to a surgical (physical) examination on the part of the appellants, on reference of the case to take additional testimony on appeal, and his failure to cause such an examination to be made, by reputable surgeons of his own selection, upon his own account, under the circumstances of this particular case, raises a conclusive presumption that he is guilty of fraud and simulation, as charged."

DEMANDS FOR SURGICAL EXAMINATION.

(1) On June 8th a written demand, for permission to make a physical examination of the appellee by

surgeons on behalf of appellants, was served upon proctors for appellee and upon appellee in person. Proctors for appellee, on the following day, in writing, refused this demand. Appellee in person took no notice of the demand. The demand and refusal, in the additional record as appellants' Exhibits F (469) and G (472), speak for themselves (165-9).

NO GROUND FOR REFUSAL.

(2) This demand was reasonable and proper and assured to the appellee all safeguards and protection he had any right to require. The written refusal by counsel for appellee recites that the refusal was upon the ground that an opportunity was given the claimant in the trial below for such an examination as is now demanded and that he failed to avail himself of it. As to what did occur in the trial below, we respectfully refer to our principal brief (pp. 41-4) and to the additional testimony (165-9, 455-461). Even though the contention of the appellee in this particular be true (which we deny), it would not justify the refusal when the case had been reopened by this court for the very purpose of taking additional testimony as to the nature and extent and probable extent of the libellant's injuries, past, present and prospective, and to determine whether or not the appellants' charges of simulation and fraud on the part of the appellee were true or false.

SHAM OF OFFERING TO SUBMIT TO SURGICAL EXAMINATION.

(3) There is also a pretense at setting up a refusal by appellants to accept an examination, upon the taking

of the additional testimony, made by surgeons selected by the district judge, as justification of the refusal by appellee to comply with this demand of the appellants. That this is a mere pretense is manifest—a repetition of the vaccilating, dallying and evasive tactics resorted to by appellee upon the similar demand in the trial below, and because of and to avoid which the demand, upon the taking of the additional testimony, was made in writing and a reply in writing required. (167-8, 457-8.) Besides, the written refusal of the appellee, as well as the testimony of his counsel and counsel of the appellants (167-8, 457-8), shows there never was an *offer* on the part of the appellee to *submit* to an examination by surgeons appointed by the district judge, but merely an *inquiry* on his part if such examination would be accepted (Exhibit G, 472), and that was met by *no objection* whatever on the part of the appellants to such an examination, but the appellee was informed appellants would insist, nevertheless, upon their demand (167). Appellants did not believe the inquiry was made in good faith and did not propose to be swerved from their purpose to avoid such negotiations as occurred below, and to preserve in writing what transpired upon this demand, that there might be no question this time what actually occurred. That this inquiry was not made in good faith is evidenced by the fact that appellee did not follow it up with such an examination upon his own responsibility. The appellants threw no obstacle whatever in his way, in the bringing of this about. Such an examination, made by reputable surgeons, while not what appellants think they are en-

titled to, yet it would doubtless have been much more satisfactory to the court than the testimony of the appellee, his wife and brother-in-law, *his counsel* and personal friends of his own selection, to the effect that, from mere observations and hearsay, they believe that the appellee was seriously injured and is permanently and totally disabled and wholly unable to perform any manual labor now or hereafter, and a miserable, helpless and pitiable cripple for life.

(4) And, again, the testimony of the appellee, as to his willingness at all times to have a surgical examination (368-9), is too sham and unreasonable to be considered at all. He admits this willingness on his part was only communicated to his proctor (390) and that he knew of appellants' demands and efforts to procure a surgical examination (391); and the acts of his proctor too flatly contradict any such instruction or feeling on the part of the appellee. It is too inconsistent with their action, both in the trial below and on the taking of the additional testimony, to be true. Besides, the attempt thus to shift the entire responsibility upon the shoulders of proctor for appellee comes rather late, and is an admission that the appellee's case needs to be relieved from the suspicion their course in this particular has entailed upon it, and that the attempt of proctor for appellee to justify his course in the matter has been a failure. It is certainly self-sacraficing on the part of the proctor for appellee.

CHARGE OF CONSPIRACY BETWEEN APPELLANTS AND SURGEONS.

(5) Proctor for appellee gives as an additional reason for refusing appellants' demand for such an examination, that the appellants insisted upon Doctors Eagleson and Ford making the examination, with whom they had prearranged to have the testimony of Doctors Miller and Wotherspoon contradicted and an examination very adverse to the appellee put in evidence. (457). Although the objection was not made to the last demand, to show that there was utterly no foundation for such a charge or excuse, and the *extent to which the other side have indulged their imaginations in this case*, Doctors Eagleson and Ford were called as witnesses by appellants and testified to their connection with the case, denying that they had given appellants or anyone connected with their defense any assurance whatever as to what their testimony might be, and that the only assurance they had given them was that, from what they had learned from reading the testimony of Doctors Miller and Wotherspoon, *this was a case in which a careful and skillful physical examination of the appellee by competent surgeons would greatly aid in arriving at the truth.* (Dr. Eagleson, 136–8. Dr. Ford, 147–9.)

CIRCUMSTANCES CALL UPON APPELLEE FOR FULL DISCLOSURE.

(6) In view of the charges of simulation and fraud and of knowingly presenting a false situation to the court, made against the appellee, and his deliberate withholding from the court and the appellants the true

situation of affairs and the only direct and proper means and method of disclosing the true state of facts, the admissions of the appellee, his household and his witnesses, and the direct and positive evidence on behalf of the appellants, establishing not only the charges but the fact that the appellee is now and must have been, at the time of the trial in the District Court, a sound man physically, we submit the appellee is called upon, if he would be fair and honest with the court, to completely unmask himself, and not only *permit*, but *invite* and *demand* a full and thorough investigation. We charge that the appellee, in refusing to permit such physical examination, as demanded by the appellants upon the taking of the additional testimony, or a reasonable substitute for it, and his failure to give the court and the appellants the benefit of such an examination made upon his own account by reputable surgeons, even of his own selection, is conclusive evidence that he is and has been simulating from the beginning and has practiced a deliberate and palpable fraud upon the court and the claimant below and intends and proposes and is attempting to perpetuate the same in this court. This conclusion, we submit, is irresistible, for why should he be so averse to the light and so persistently refuse to submit to the only true and proper test of this most vital question, and insist upon its being determined by means and methods secondary in character and which he can control much as he pleases, if he had nothing to fear and nothing to conceal? Why did not appellee call upon his own physicians and surgeons, *who can more effectually than anyone else refute the charges*

made against him, if they are in fact untrue? Where is Dr. Miller? Where is Dr. Wotherspoon? who attended appellee when he was injured and who testified in his behalf just one year ago, and upon whose medical and surgical testimony given at the time, appellee insists upon resting his case. Neither are shown to be dead, or out of the country, or unwilling to testify further in appellee's behalf. Is it possible that they have been consulted by the appellee and he informed by them that *their further testimony* would not do his case any good? Such, we submit, under the circumstances of the case, is the presumption the law raises. Appellee says Dr. Miller is still prescribing for him, although he has not been to see him since last December, and is giving all the medical and surgical attention he is receiving. (374–5). Would not a little further testimony from Drs. Miller and even Wotherspoon, as to their subsequent investigations and examinations of the appellee, (he admits such were made) be a little more satisfactory to the court than the testimony that has been substituted for it; and would not their testimony upon the taking of the additional testimony after a careful examination of the appellee been infinitely more satisfactory, direct and positive as to the appellee's physical condition than the character of evidence which the appellee insists the court shall take in its stead?

(7) Counsel for appellee testified upon his oath, upon the taking of the additional testimony, that he believed a further surgical examination would develop greater disability (460). Then why in the name of reason, we

submit, didn't he permit it on our part or produce it himself? This statement is not very consistent with the laborious effort, both in the trial below and on the taking of the additional testimony, the voluminous personal affidavit of counsel for appellee, resisting claimant's motion in the District Court for permission to make a surgical examination, and the voluminous written refusal of the same, upon the taking of the additional testimony—all, to shut out such an examination on our part, that they might have the privilege of omitting it themselves, and thus entirely elude it. He then further testifies that he did not consider a further surgical examination necessary (456-8); but he not only deemed it necessary to call upon a large number of non-expert witnesses to testify as to their opinion of the physical condition of the appellee and of the nature and extent of his injuries, *but to himself go upon the stand and testify to that effect.*

REFUSAL AND FAILURE TO HAVE SURGICAL EXAMINATION FATAL.

(8) We submit appellee's refusal upon the taking of the additional testimony, to submit to or produce some reasonably satisfactory surgical or medical test of the fact, nature and extent of his alleged injuries, is fatal to his recovery.

TESTIMONY OF PROCTOR FOR APPELLEE.

(9) *We most respectfully call the attention of the court to the testimony of Mr. Martin, of proctors for the appellee, and solely from motives of professional courtesy*

refrain from any comment whatever. This we submit to the careful consideration of the court. (452-462.)

LAW OF THE CASE.

(10) A disposition in a plaintiff or defendant to smother the truth is fatal and should be fatal to his case.

(11) The conduct of a party, in preventing or omitting the production of evidence in elucidation of the subject matter in dispute, which is peculiarly within his power, raises a strong suspicion that the evidence, if adduced, would be against him.

Stark on Evidence, Vol. 1, p. 54.

(12) "That if weaker and less satisfactory evidence is given and relied on in support of a fact, when it is apparent to the court and jury that proof of a more direct and explicit character was within the power of the party, the same caution which rejects the secondary evidence will awaken distrust and suspicion of the weaker and less satisfactory, and it may well be presumed, that if the more perfect exposition had been given, it would have laid open deficiencies and abjections which the more obscure and uncertain testimony was intended to conceal."

Clifton v. The United States, 4 How. 242.
Dalrymple v. Craig, 50 S. W. 884.

(13) The general rule above set forth is further illustrated and established by the holding, that the

failure of a party, without satisfactory explanation, to call witnesses peculiarly situated to know the truth, raises the presumption that their testimony would be strongly against him and fatal to his suit.

The Joseph B. Thomas, 81 Fed. 578.
Railway Co. v. Ellis, 10 U. S. App. 640.
Frank Waterhouse, Ltd., v. Rock Island & Alaska Min. Co., 97 Fed. 466.
Hicks v. Nasson Electric R. Co., 62 N. Y. S. 597.
The Ville Du Havre, Fed. Case No. 16943 (7 Ben. 328).
The Fred M. Laurens, 15 Fed. 635.

(14) This general rule is also further illustrated and established by the holding that the suppression or making way with written instruments, supposed to contain evidence material to a case, by a party thereto, raises a presumption that their contents would have proved unfavorable to his case.

Jones v. Knauss, 31 N. J. Eq. 609.
The Olinda Rodriques, 174 U. S., 510.
Mantonya v. Reilly, 56 N. E. 425.
Ames v. Manhattan Life Ins. Co., 52 N. Y. S. 759.
Rector v. Rector, 3 Gill. (Ill.) 105.
Merwin v. Ward, 15 Conn. 377.
Riggs v. Penn. & N. E. R. Co., 16 Fed. 804.
Winchell v. Edwards, 57 Ill. 41.

(15) Another illustration of this general rule is the holding that, where salvors conceal from the court the

names of persons participating in the salvage service, *their libel will be dismissed.*

Hessian v. The Edward Howard, Fed. Case No. 6436 (1 Newby. Adm. 522).

(16) Destruction, concealment or fabrication of evidence, or an attempt to stiffle or thwart investigation, even in criminal matters, raises a presumption of guilt.

Lawson on Presumptive Evidence (1st Ed.), pp. 533, 539.

V.

FIFTH POINT.

"That whatever merit the claims of the appellee may have had (and we deny they ever had any), the fraud practiced by him through deceit and fabrication of evidence, upon the District Court, as well as the owners of the ship, in the trial below, and his intention and attempt to perpetuate the same in this court, estops him from asserting such in this or any other court, and is fatal to his recovery."

(1) "A proved fabrication of evidence, unexplained, will compel an adverse decree."

The Tillie, Fed. Case No. 14048 (7 Ben. 382).

The Chicago City Ry. Co. v. M. Mahon, 103, Ill. 485.

The Sylvan Grove, 29 Fed. 336.

(2) An attempt at imposition and fraud upon the court is fatal to any merit the claims of the guilty party may have.

The Dos Hermanos, 2 Wheat. 76.

(3) The fraudulent raising or exaggeration of even a meritorious claim vitiates the whole claim.

The Sampson, Fed. Case No. 12279 (4 Blatch. 28).

Respectfully submitted that the decree of the District Court should be reversed and the libel dismissed.

METCALFE & JURY,
ANDROS & FRANK,
Proctors for Appellants.

August 27th, 1900.